



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Maryland State Department of Education

File: B-288501; B-288502

Date: August 14, 2001

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DIGEST

Protests filed by a state licensing agency for the blind alleging solicitation improprieties in two requests for proposals issued pursuant to the Randolph-Sheppard Act are dismissed because the Act gives authority for review of disputes between federal agencies and state licensing agencies regarding these procurements to the Secretary of Education, not the General Accounting Office.

DECISION

The Maryland State Department of Education, Division of Rehabilitation Services, challenges the terms of requests for proposals (RFP) Nos. FA4416-01-R-0058 and FA4416-01-R-0059, issued by the Department of the Air Force for food services at Andrews Air Force Base (AFB) and Fort George G. Meade, respectively. The protester alleges that the solicitations violate certain Department of Defense (DOD) Regulations implementing the Randolph-Sheppard Act, 20 U.S.C. §§ 107 et seq. (1994), and violate other DOD policies and guidance related to the Act as well.

We dismiss the protests.

The RFPs here advised that this procurement would be conducted pursuant to the Randolph-Sheppard Act, which establishes a priority for blind persons recognized and represented by state licensing authorities (SLA) under the terms of the Act, in the award of contracts for, among other things, the operation of cafeterias in federal buildings. 20 U.S.C. § 107(b); 34 C.F.R. § 395.33(a) (2000). Under the Act's implementing regulations, if a designated SLA submits an offer found to be within

the competitive range for the acquisition, award must be made to the SLA. 34 C.F.R. § 395.33(b). The protester here is the designated SLA for these procurements.

In its protests, the SLA argues that two features of these solicitations violate DOD regulations, policies, and guidance established to ensure compliance with the Randolph-Sheppard Act. The first of these two features is the solicitation provision in both RFPs that states:

If the SLA submits a proposal that is included in the final competitive range established by the Contracting Officer (as identified below), the SLA will receive award of the contract

RFP -0058, amend. 3, at 2; RFP -0059, amend. 5, at 2 (emphasis added). The second feature, also in both RFPs, anticipates that during the price evaluation, each offeror's price will be increased by 10 percent, except for offers received from "HUBZone small business concerns, in accordance with FAR [§] 52.219-4." RFP -0058, amend. 3, at 3; RFP -0059, amend. 5, at 3.

The Air Force seeks dismissal of these protests on the basis that the authority for administering the requirements of the Randolph-Sheppard Act--and specifically for resolving disputes between SLAs and contracting agencies--has been placed with the Secretary of Education. 20 U.S.C. § 107d-1(b); 34 C.F.R. § 395.37(a). According to the Air Force, the Act anticipates that complaints by SLAs about an agency's handling of a procurement conducted pursuant to the Act will be addressed by arbitration.

In response, the SLA argues that the Act's assignment to the Secretary of the authority to resolve disputes between SLAs and contracting agencies does not include disputes about apparent solicitation improprieties. In addition, the SLA contends that the arbitration provisions of the Act, and its implementing regulations, are limited to issues of compliance with the Act itself, while these protests challenge the agency's compliance with other procurement statutes and regulations.

DISCUSSION

The Randolph-Sheppard Act has the stated purpose of "providing blind persons with remunerative employment, enlarging the economic opportunities of the blind, and stimulating the blind to greater efforts in striving to make themselves self-supporting." 20 U.S.C. § 107(a). The Act directs the Secretary of Education to designate state agencies responsible for training and licensing blind persons, and provides that "[i]n authorizing the operation of vending facilities on Federal property, priority shall be given to blind persons licensed by a State agency." 20 U.S.C. § 107(b). For purposes of the instant case, the Act includes cafeterias and snack bars within the definition of a "vending facility." 20 U.S.C. § 107e(7). With respect to the operation of cafeterias at federal facilities, the Act directs the Secretary of Education to issue regulations to establish a priority for blind licensees

whenever “such operation can be provided at a reasonable cost with food of a high quality comparable to that currently provided to employees, whether by contract or otherwise.” 20 U.S.C. § 107d-3(e).

Pursuant to this authority, the Secretary of Education has promulgated extensive regulations addressing the Act’s requirements. Among the matters covered by these regulations are rules governing the relationship between the SLAs and blind vendors, rules for becoming a designated SLA within the meaning of the Act, procedures for the oversight of SLAs by the Secretary, and rules governing the relationship between SLAs and other federal government agencies. 34 C.F.R. Part 395. With respect to disputes between SLAs and federal agencies, both the statute and the regulations provide for the filing of complaints with the Secretary, which are then resolved by binding arbitration. 20 U.S.C. § 107d-1(b); 4 C.F.R. § 397.37. Specifically, the regulation, which tracks closely the language of the statute, provides:

Whenever any [SLA] determines that any department, agency, or instrumentality of the United States which has control of the maintenance, operation, and protection of Federal property is failing to comply with the provisions of the Act or of this part and all informal attempts to resolve the issues have been unsuccessful, such licensing agency may file a complaint with the Secretary

34 C.F.R. § 395.37(a).

With respect to the protester’s assertion that the regulation quoted above does not reach to resolution of a dispute about apparent solicitation improprieties, we see no such limitation in the regulation. In this regard we note that the implementing regulations elsewhere specifically address an SLA’s dissatisfaction with an agency decision that the SLA’s proposal should be excluded from the competitive range. See 34 C.F.R. § 395.33(b). Given this fact, we conclude that the drafters of the implementing regulation knew how to draw distinctions between the types of disputes that could arise between SLAs and agencies had they intended to do so; they did not do so here. Without such a distinction, we have no basis to conclude that section 395.37(a) of the implementing regulation does not apply to solicitation challenges.

In its alternative response to the agency’s request for dismissal, the protester argues that the implementing regulation does not confer authority on the Secretary to consider disputes between SLAs and agencies regarding other procurement statutes and regulations. We need not address this issue because, despite the protester’s assertions to the contrary, both of the protest issues raised here, at their core, challenge the agency’s compliance with the Act.

The SLA argues that these Air Force solicitations violate DOD regulations, policies and internal guidance about implementing the Randolph-Sheppard Act. Despite this characterization, however, a review of the protest issues shows that they, in fact,

raise matters of Randolph-Sheppard compliance. Specifically, the first issue involves an apparent attempt to modify the implementing regulation's creation of a priority whenever an SLA's proposal is found to be within the competitive range. Under the solicitations here, the Air Force would defer an SLA's priority until determination of a final competitive range, rather than an initial one. Similarly, the second protest issue—i.e., whether the HUBZone small business price preference is appropriately applied in a Randolph-Sheppard procurement—again goes to the Act's creation of a priority, and raises the question of whether an SLA's proposal must withstand the application of a price premium before the proposal receives the priority. In our view, these are the kind of questions Congress expressly reserved for the Secretary under the statutory and regulatory scheme established for Randolph-Sheppard procurements. See 34 C.F.R. § 395.37(a).

As a final matter, we note that the protester contends that if it is required to take its complaint to the Secretary, it will not be able to obtain the automatic stay of the procurement available in this forum. Thus, the protester complains that resolution of this dispute in its favor would likely occur too late for it to receive any meaningful remedy. While the protester may be right, the unavailability of a stay in disputes between SLAs and agencies under the Randolph-Sheppard Act does not warrant our considering this dispute in view of Congress' clear intent to vest authority for resolving disputes such as these with the Secretary. We note that the Secretary's authority under the Act includes broad remedial powers that may enable him to minimize the impact of not having the stay that is available in this forum.¹ Mississippi State Dep't of Rehabilitation Servs., B-250783.8, Sept. 7, 1994, 94-2 CPD ¶ 99 at 4 n.4.

In conclusion, since Congress has specifically authorized the Secretary of Education, not our Office, to review complaints from SLAs about agency compliance with the Randolph-Sheppard Act, and since these protests raise issues clearly related to the reach and scope of the Act, we will not review the Maryland State Department of

¹For the record, we also note that in previous cases where we have taken jurisdiction over a complaint about the operation of the Randolph-Sheppard Act, the protest was filed by a business that was competing with an SLA for an award, not by an SLA. See generally Centro Management, Inc., B-286935, B-286935.2, Feb. 26, 2001, 2001 CPD ¶ 41; Grants Janitorial and Food Serv., Inc., B-275157, Jan. 27, 1997, 97-1 CPD ¶ 50; Department of the Air Force—Recon., B-250465.6 et al., June 4, 1993, 93-1 CPD ¶ 431, aff'd, Triple P Servs., Inc.—Recon., B-250465.8, B-250783.4, Dec. 30, 1993, 93-2 CPD ¶ 347. Since the right to arbitration of disputes about an agency's compliance with the Act applies only to SLAs, rather than businesses, our review in those cases was appropriate.

Education's protests. Id.; Alabama Dep't of Rehabilitation Servs., B-275600, B-275600.2, Dec. 12, 1996 (unpublished); State of Louisiana, Dep't of Social Servs., B-274952, Oct. 17, 1996 (unpublished).

The protests are dismissed.

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General Counsel